

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

J. WAYNE AND CINDY MCMEANS,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 05-066

SUMMARY JUDGMENT ORDER

Appellants J. Wayne and Cindy McMeans (“McMeans”) filed an appeal of a denial of a water right claim amendment issued by Respondent Washington Department of Ecology (“Ecology”). Richard Cole represented the McMeans. Assistant Attorney General Maia Bellon represented Ecology. This matter is before the Pollution Control Hearings Board (“Board”) on a Motion for Summary Judgment filed by Ecology. The Board consisted of Bill Clarke, Presiding, William H. Lynch, and David W. Danner. The matter was decided by the Board on the written record, consisting of the following:

1. Ecology’s Motion and Memorandum for Summary Judgment;
2. Declaration of Ken Slattery in Support of Ecology Motion for Summary Judgment;
3. McMeans’ Memorandum in Opposition to Ecology’s Motion for Summary Judgment;
4. Ecology’s Reply to McMeans’ Opposition; and
5. Declaration of Sharonne O’Shea.

I. BACKGROUND

[1]

In 2004, the McMeans filed a request for amendment of a water right claim under RCW Chapter 90.14. The water right claim the McMeans sought to amend was filed by their

1 predecessor in interest, Jack Mihalcik, in 1974. The claim filed by Mihalcik was assigned water
2 right claim registry number 160956 by Ecology in 1975.

3 [2]

4 The McMeans' claim filed by Mihalcik was done on a "short form" claim form. The
5 form has three sections relating to the attributes of the water right claim. In section one, the box
6 for "surface water" was checked, and the source was listed as Caribou Creek and Springs. In
7 section two, four boxes for the purposes of use were checked for "Domestic," "Stockwatering,"
8 "Irrigation (lawn and garden)" and "Other use (specify) Irrigation." In section three, the
9 claimant described the place of use as "Southwest ¼ of Section 17 Township 18 North – Range
10 20 East WM in County of Kittitas."

11 [3]

12 Ecology developed the forms for use by water rights claimants. The standard water right
13 claim form includes eight different subsections corresponding to the statutory requirements for
14 filing a water right claim in RCW 90.14.051. Ecology's "short form" claim form includes three
15 subsections. Both claim forms include instructions on how to fill out and submit the claim form.
16 Ecology also produced publications on the Water Right Claims Registration Act explaining how
17 water right claims should be filed.
18

19 [4]

20 In 2004, the McMeans filed an Amended Claim for Water Right for Claim No. 160956.
21 In the first section of the form, the claimant is to provide the "Reason for Amended Claim:
Please check appropriate box(es)." In this section, the McMeans checked the third box, which

1 provides that the reason for the amended claim is that “The amendment is ministerial in nature.”
2 In the space on the form provided for an explanation, the McMeans wrote “Jack was given the
3 incorrect form at the Yakima office. He told us he filed a Water Right Claim for irrigation. On
4 the form he was given, he specified ‘IRRIGATION’ as an other use.”

5 **[5]**

6 The second section of the amended claim form is for information to be amended. The
7 McMeans requested eight amendments to the water right claim. (1) In subsection A. “Quantity
8 of water claimed,” the McMeans added “2 cfs.” (2) In subsection B. “Annual quantity claimed,”
9 the McMeans added “350” acre-feet per year with 300 AF presently used. (3) In subsection C.,
10 for acres of irrigation claimed, the McMeans added “93.36.” (4) In subsection D., for time
11 during the year when water is used, the McMeans added “all year.” (5) In the subsection for
12 “date of first putting water to use,” the McMeans added three different dates for different areas
13 of land, as follows:

14 (a) October 8, 1888, on the SW ¼ of the SW ¼ (R.D.C. Homestead)

15 (b) July 23, 1892, on the N ½ of the SW ¼ (R.D.C. Taylor-NPRR)

16 (c) December 24, 1894, on the SE ¼ of the SW ¼ (R.D.C. Taylor-NPRR)

17 (6) In the subsection on “location of point(s) of diversion/withdrawal,” the McMeans
18 added “350 feet S and 100 feet W From the N ¼ section of Section 17 being within the NW ¼ of
19 Section 17 T. 18 N. R 20 [EWM].” (7) The McMeans added “irrigation” to the subsection on
20 “Purpose(s) for which water is used” and also added (8) “Riparian/Appropriated” as the “The
21 legal doctrine upon which the right of claim is based.”

[6]

1 The claim form used in 1974 by Jack Mihalcik does not seek or provide space for the
2 type of water right claim information provided by the McMeans in 2004. The water use
3 information provided by the McMeans in 2004 is the type of water right claim information
4 sought in a long form claim form. Ecology determined that the amendments sought by the
5 McMeans in 2004 were not “ministerial amendments” pursuant to RCW 90.14.065(3) and denied
6 the McMeans’ request for the claim amendments.

7 II. ANALYSIS

8 [1]

9 Summary judgment is designed to do away with unnecessary trials when there is no
10 genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). In a
11 summary judgment proceeding, the moving party has the initial burden of showing that there is
12 no dispute as to any material fact. *Hiatt v. Walker Chevrolet*, 120 Wn.2d 57, 66, 837 P.2d 618
13 (1992). A material fact is one upon which the outcome of the litigation depends. *Jacobsen v.*
14 *State*, 89 Wn.2d 104, 569 P.2d 1152 (1977).

15 If a moving party does not sustain its burden, summary judgment should not be
16 granted, regardless of whether the nonmoving party has submitted affidavits or
17 other evidence in opposition to the motion. [Citation omitted.] Only after the
18 moving party has met its burden of producing factual evidence showing that it is
entitled to judgment as a matter of law does the burden shift to the nonmoving
party to set forth facts showing that there is a genuine issue of material fact.
19 *Hash v. Children’s Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

20 [2]

21 In ruling on a motion for summary judgment, the Court must consider all of the material
evidence and all inferences therefrom in a manner most favorable to the non-moving party and,

when so considered, if reasonable persons might reach different conclusions, the motion should
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1 be denied. *Id.*; *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960). If, on a motion for
2 judgment on the pleadings, “matters outside the pleading are presented to and not excluded by
3 the court, the motion shall be treated as one for summary judgment and disposed of as provided
4 in rule 56.” CR 12 (c). Accordingly, the analysis will proceed in a manner similar to a motion
5 for summary judgment. The Board finds there are no material facts in dispute and that resolution
6 by summary judgment is appropriate.

7 **[3]**

8 The Pre-Hearing Order in this case set the single legal in this appeal as:

9 Whether Ecology appropriately issued Order No. 2177 denying Appellants’ amendment
10 for Water Right Claim No. 160956 pursuant to RCW 90.14.065?

11 **[4]**

12 The Water Rights Claims Registration Act governs the filing of water right claims in
13 Washington. RCW 90.14.051 provides a list of eight items of information that must be on a
14 claim form:

15 The statement of claim for each right shall include substantially the following:

- 16 (1) The name and mailing address of the claimant.
- 17 (2) The name of the watercourse or water source from which the right to divert or make
18 use of water is claimed, if available.
- 19 (3) The quantities of water and times of use claimed.
- 20 (4) The legal description, with reasonable certainty, of the point or points of diversion
21 and places of use of waters.
- (5) The purpose of use, including, if for irrigation, the number of acres irrigated.
- (6) The approximate dates of first putting water to beneficial use for the various amounts
and times claimed in subsection (3).
- (7) The legal doctrine or doctrines upon which the right claimed is based, including if
statutory, the specific statute.
- (8) The sworn statement that the claim set forth is true and correct to the best of
claimant’s knowledge and belief.

1 RCW 90.14.051.

2 [5]

3 After providing this list of information that must be on a statement of water right claim,
4 RCW 90.14.051 then provides an exception to the information that must be on the statement of
5 water right claim for those claims filed pursuant to RCW 90.44.050, the exempt well statute:

6 Except, however, that any claim for diversion or withdrawal of surface or ground water
7 for those uses described in the exemption from the permit requirements of RCW
8 90.44.050 may be filed on a short form to be provided by the department. Such short
9 form shall only require inclusion of sufficient data to identify the claimant, source of
10 water, purpose of use and legal description of the land upon which the water is used:
11 PROVIDED, That the provisions of RCW 90.14.081 pertaining to evidentiary value of
12 filed claims shall not apply to claims submitted in short form: AND PROVIDED
13 FURTHER, That claimants for such minimal uses may, at their option, file statements of
14 claim on the standard form used by all other claimants.

11 [6]

12 The Water Rights Claims Registration Act also provides that a previously filed statement
13 of claim may be amended “if the submitted amendment is based on:

- 14 (1) An error in estimation of the quantity of the applicant's water claim prescribed in
15 RCW 90.14.051 if the applicant provides reasons for the failure to claim such right in the
16 original claim;
17 (2) A change in circumstances not foreseeable at the time the original claim was filed, if
18 such change in circumstances relates only to the manner of transportation or diversion of
19 the water and not to the use or quantity of such water; or
20 (3) The amendment is ministerial in nature.

18 RCW 90.14.065.

19 The amendment sought by the McMeans was based on RCW 90.14.065(3), which allows
20 for claim amendments that are “ministerial in nature.” Ecology denied the requested claim
21 amendment based on its determination that the amendments were not “ministerial in nature.”

1 Ecology's order includes the following statement in response to each of the requested
2 amendments:

3 It also does not meet the criterion of being 'ministerial in nature,' because Ecology
4 generally interprets this phrase to mean a typographical or clerical error which occurred
5 in the act of filling out the original claim form or a change to an item of information on
the original form that conflicts with the other information on the form, which by
amending that item will eliminate that inconsistency.

6 [7]

7 The Court of Appeals has previously considered the meaning of the phrase "ministerial in
8 nature" in RCW 90.14.065(3) in a case also dealing with a claim amendment from the Yakima
9 Basin. *Willowbrook Farms LLP v. Ecology*, 116 Wn.App 392 (2003), dealt with a claims
10 amendment filed to add a quarter section of land to the water right claim's place-of-use
11 description. Ecology denied the requested claim amendment on the basis that the amendment
12 was not "ministerial in nature," which Ecology interpreted to mean clerical or typographical.
13 On appeal, the Superior Court and then the Court of Appeals held that the claim amendment filed
14 in that case was ministerial in nature because it would correct an error that made the original
15 claim internally inconsistent. The specific error identified was the legal description. The
16 consequence of the error was that the original legal description was smaller than number of
17 irrigated acres and quantity of water used for irrigation. By allowing the claimant to amend the
18 legal description, the quantity of water, number of irrigated acres, and legal description of the
19 place of use could be reconciled.

20 [8]

21 The McMeans' requested claim amendments do not reconcile conflicting information in
the original claim form or correct errors made in filing out the original claim form. Rather, the

1 McMeans' claim amendments provide water right claim information that is required of a
2 standard water right claim by RCW 90.14.051. Specifically, the claim filed by Mihalcik
3 contained the information a claimant would provide for an exempt well claim. Mihalcik used a
4 short form claim form. Filing only a short form exempt well claim, rather than a water right
5 claim meeting the requirements of RCW 90.14.051, does not indicate an intent to provide notice
6 of any water use beyond an exempt use under RCW 90.44.050. The McMeans argue that
7 because the original claim provided "a little more than half the suggested information," it can
8 now be amended pursuant to RCW 90.14.065(3).¹ The Board disagrees. Under the analytical
9 framework of the *Willowbrook* case, the McMeans claim amendments would not correct
10 previous information to make the claim consistent with the claimant's intentions, but rather,
11 would provide the information sought by RCW 90.14.051 for the first time, over 30 years after
12 the original claim filing. Such an act is not "ministerial in nature" because the error relates to
13 failure to file the required information altogether.

14
15
16 [9]

17 The McMeans also raise the issue of substantial compliance with the requirements of the
18 Water Rights Claims Registration Act as a basis on which they should be authorized to amend
19 the original Mihalcik claim. The substantial compliance argument raised here by the McMeans is
20 misplaced in that this appeal concerns whether the McMeans may amend the claim pursuant to
21 RCW 90.14.065(3). In contrast, the substantial compliance issue relates to the adequacy of the

¹ The McMeans are correct that the original claim lists a quarter section of land as the legal description of the lands on which the water is used. Standing alone, this would indicate more than an exempt water use. In the context of the entire statement of claim, however, the claim appears to be for exempt water use only.

1 original claim filed by Jack Mihalcik in 1974 – that is, did the claim filing substantially comply
2 with RCW 90.14.051? The Board need not address the question of the adequacy of the original
3 claim filing, because the legal issue before the Board is whether the amendment requested is
4 allowed under RCW 90.14.065(3).

5 **[10]**

6 The Board does not doubt that errors and omissions made during the open claims filing
7 periods have resulted in hardships. To remedy such hardships, the Legislature established claims
8 openers to allow water users to properly file claims. The Legislature did not authorize liberal
9 amendment of claims, but rather, created limited circumstances under which a claim may be
10 amended. The provision at issue in this case, RCW 90.14.065(3), allows for amendments that
11 are ministerial in nature. The amendments sought by the McMeans are beyond that standard
12 under the *Willowbrook* case.

13 **[11]**

14 Based on the foregoing analysis, the Board enters the following

15 **ORDER**

16 Ecology's Motion for Summary Judgment is GRANTED, and the case is DISMISSED.

17 SO ORDERED this 27th day of September 2005.

18 **POLLUTION CONTROL HEARINGS BOARD**

19 BILL CLARKE, Presiding

20 WILLIAM H. LYNCH, Member

21 DAVID W. DANNER, Member